79252-6

SUPREME COURT NO. 79252-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

LEO C. BRUTSCHE,

Appellant,

vs.

CITY OF KENT, a municipal corporation,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Brian Gain, Judge

APPELLANT'S REPLY TO CITY'S ANSWER TO PETITION FOR REVIEW

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I. *INTRODUCTION*

The Court of Appeals' unpublished[1] opinion purports to foreclose any state law remedy for negligence, trespass or takings that innocent property owners have for property damage caused by police arising from the execution of search warrants. Respondent City's Answer to Petition for Review contains misstatements of fact and law in an effort to distract the Court from the important issues presented by this appeal. This reply is submitted to show that the City's answer does not furnish any basis to deny Mr. Brutsche's petition for review.

II. *CORRECTIONS TO CITY'S FACTUAL MISSTATEMENTS*

The first factual misstatement in the City's answer is the claim that Leo Brutsche wanted the SWAT team to stop its raid to allow Mr. Brutsche to open doors on his property for them.[2] In his certification in opposition to Kent's summary judgment motion, Mr. Brutsche explained what really happened:

> 5. At the time of the raid, I offered my keys to the officer in charge, Sergeant Jaime Sidell. I offered to escort the officers around my property and open all doors for them. Sergeant Sidell rejected my offer saying "... we have our own ways of getting in...".
>
> . . .
>
> 7. I believe the custom or practice of using a battering ram to breach the doors is unreasonable under the circum-

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[1] A motion to publish is pending in the Court of Appeals.

[2] City's Answer, page 1.

> stances here. Use of my keys would be much quicker and quieter, making the entry much safer for the officers. Also, keys would not damage the doors and the door jambs like the battering rams.

CP 135. Mr. Brutsche never intended to stop the raid as now alleged by Respondent. He would have been content to give his keys to the police so they could use the keys instead of the rams.

A second red herring/factual misstatement is the City's claim that Mr. Brutsche's son Jim was involved with "illegal drugs" and died in a "meth lab" one year after the SWAT raid. Those claims are false, for three reasons. First, Leo Brutsche visited his son daily and never saw any indication of drug activity. CP 135. Second, the officers' search inventory after the raid shows that no persons nor property were seized. No drugs, paraphernalia, or meth lab equipment were found, anywhere on the property. In short, the SWAT raid was a tragic, shocking mistake. CP 86-87. Third, Jim died in an accident which involved a leaking propane tank, not drug manufacturing. CP 137.

A third red herring/factual misstatement by the City concerns the allegations regarding Jim Brutsche's alleged actions inside his home when the SWAT team attacked. The Estate of Jim Brutsche was not a party to this lawsuit. No claims concerning the SWAT team assault on his home were brought in this case. The court below did not litigate or determine the factual accuracy of any of the assertions about Jim Brutsche's actions made by Respondent in its answer on page 3.

As the defense counsel are well aware, the allegations on page 3 are disputed. Depositions of civilian witnesses and written discovery in another matter reveal the following:

(1) The SWAT team decided to conduct a military-style assault on Jim Brutsche's home, followed by a "slow and deliberate" search of the remainder of the property.

(2) The police detonated a stun grenade outside his home. They then shattered the sliding glass front door to his home, which caused Mr. Brutsche's living room floor to be covered with small pieces of glass.

(3) As Jim Brutsche lay on his stomach on the floor, shirtless, the police kicked him, struck him and tasered him repeatedly.

(4) Jim Brutsche was unarmed.

(5) He was not combative, nor did he fight with the officers.

(6) His injuries resulted in his hospitalization.

Since the SWAT assault on Jim Brutsche's mobile home was not part of the current case, the facts regarding that assault were not litigated nor resolved in the court below. Since formal discovery is being conducted in another matter and defense counsel has actual knowledge that the facts are disputed, fairness requires that the facts listed above be brought to this Court's attention.

III. *REPLY ARGUMENT ON NEW ISSUES*

A. *Negligence*

In its opinion, the Court of Appeals claimed that there is a "general rule that law enforcement activities are not reachable in negligence". We contend that the decision of the Court of Appeals is in conflict with decisions of this Court, and that review should be granted under RAP 13.4(b)(1). In

support of our argument, we cited seven decisions of this Court and one decision of the Court of Appeals which hold that various types of law enforcement activities are reachable in negligence.[3] The Court of Appeals case we cited concludes that police officers had a duty to act with reasonable care in connection with protecting property from destruction by a third party. *Coffel v. Clallam County*, 47 Wn. App. 397, 403-405, 735 P.2d 686, 690-691 (1987).

The City points out that these cases did not examine police conduct when executing a search warrant. However, the City proposes no reason why the negligence analysis contained in the cases we cited should not apply to police actions during execution of a search warrant.

The City's argument that non-search warrant cases should not be considered is ironic in light of the City's heavy reliance on *Keates v. Vancouver*, 73 Wn. App. 257, 869 P.2d 88 (1994). *Keates* itself is not a search warrant case but instead involved a lawsuit brought by a murder suspect for the torts of outrage and negligent infliction of emotional distress committed against him when he was interrogated about his wife's murder. The *Keates* opinion, to the extent that it attempts to preclude negligence actions against police officers, is also in conflict with the decisions of this Court which we cited in our petition for review.[4]

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[3] Petition for Review, pages 5-8.

[4] The federal cases cited by the City of Kent are inapposite. In *Duran v. City of Douglas*, 904 F.2d 1372 (9th Cir. 1990), the plaintiff directed a series of expletives and an obscene gesture at a police officer. The officer responded by detaining and arresting Mr. Duran. Mr. Duran then brought a (continued...)

Finally, Respondent City attempts to brush aside the case of *Goldsby v. Stewart*, 158 Wash. 39, 290 P. 422 (1930), a case which is on point. *Goldsby* held that in executing a search warrant, officers should do no unnecessary damage to the property to be examined, and should so conduct the search as to do the least damage to the property consistent with a thorough investigation. *Goldsby*, 158 Wash. at 41. Although the opinion does not use the terms "negligence" or "duty", it is clear that in *Goldsby* this Court recognized that officers have a duty not to cause unnecessary damage during the execution of a search warrant. *Goldsby* clearly supports Mr. Brutsche's action for damages for negligence. Respondent's attempt to minimize or distinguish the case is unavailing.

B. *Trespass*

Respondent makes the false claim that Appellant raised the legal issue of trespass ab initio for the first time in Appellant's reply brief. [5] Actually, trespass ab initio is addressed in the opening brief of Appellant at pages 25 and 26. Appellant cites the Restatement:

> (2) One who properly enters land in the exercise of any privilege to do so, and thereafter commits an act which is tortious, is subject to liability only for such tortious act, and does not become liable for his original lawful entry, or for his lawful acts on the land prior to the tortious conduct.

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[4](...continued)
lawsuit under Title 42, United States Code, § 1983. *Dahlia v. United States*, 441 U.S. 238, 99 S. Ct. 1682, 60 L. Ed. 2d 177 (1979), was a criminal prosecution which involved electronic surveillance issues. Neither case involved an action for damages for negligence.

[5] City's Answer to Petition for Review, pages 12-13.

Restatement (Second) of Torts, § 214(2). Trespass ab initio is just the doctrine which led to § 214(2) of the *Restatement*, and is important to show that police have always been liable for their conduct despite their initial privilege. *Hamilton v. King County*, 195 Wash. 84 (1938). The assignment of error is "B". Brief of Appellant, page 8.

C. *Interlocal Agreement*

Respondent attempts to raise the new issue that an interlocal agreement was not required to operate an interlocal SWAT team because the City of Kent invited the other officers to execute the warrant. *See* City's Answer to Petition for Review, pages 13-14. The City's claim contradicts the declaration in support of summary judgment by Lieutenant Villa of Tukwila who claimed he was in charge, not Kent. *See* CP 46. Villa says:

> I am a lieutenant with the Tukwila, Washington Police Department. In July of 2003, as part of my responsibilities as a Tukwila police officer, I served as commander of the Valley Special Response Team (SRT).

Declaration of Lieutenant Mike Villa. CP 46. The Respondent's reliance on RCW 10.93.070(3) for authority of officers to respond to a request for assistance from the agency with territorial jurisdiction is incorrect. The Villa declaration proves it.

This issue concerns the delegation of powers in a democracy and the requirement that the Kent City Council control interlocal cooperation pursuant to RCW 10.93.130 and comply with the requirements of RCW 39.34.

D. *Taking*

The cases cited by the City in its answer do not support its position. The taking of Mrs. Eggleston's wall was justified as a seizure of evidence. *Eggleston v. Pierce County*, 148 Wn.2d 760, 774 (2003). The justification for incarcerating the witnesses in *Hurtado v. United States* was to assure their appearance in a criminal trial. 410 U.S. 578 (1973). Here, no evidence was found and none was seized. Private property was damaged. Mr. Brutsche should be compensated under Const. Art. I, § 16.

IV. *CONCLUSION*

Respondent City of Kent's answer does not furnish any basis to deny Mr. Brutsche's petition for review. We urge the Court to grant review and set the case for oral argument.

DATED this 30 day of November, 2006.

Respectfully submitted,

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